IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 97-2383
v.	:	
	:	CRIMINAL ACTION
WINSTON HARRIS	:	NO. 93-06

MEMORANDUM AND ORDER

Yohn, J. July , 1997

On July 8, 1994, a jury convicted defendant Winston Harris on all four counts of an indictment charging him with possession with the intent to deliver cocaine base ("crack"), see 21 U.S.C. § 841, possession with the intent to deliver cocaine, see id., possession of a firearm in connection with a drug trafficking offense, see 18 U.S.C. § 924(c)(1), and possession of a firearm by a previously convicted felon, see 18 U.S.C. § 922(g). After failing in his direct appeal to the United States Court of Appeals for the Third Circuit, see United States v. Harris, No. 94-2026 (3d Cir. July 3, 1995), the defendant filed this motion to vacate his sentence pursuant to 28 U.S.C. § 2255 and a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33.[1]

The government concedes that defendant's sentence under count III of the indictment for violating 18 U.S.C. § 924(c)(1)

[1] Defendant's allegations with reference to his Rule 33 motion will be dealt with by separate order.

must be vacated in light of the United States Supreme Court's decision in Bailey v. United States, 116 S. Ct. 501 (1995).[2] The court will, therefore, grant the defendant's motion to vacate his sentence under count III of the indictment. For reasons set out below, however, the court will deny the defendant's remaining claims for relief under 28 U.S.C. § 2255.

DISCUSSION

Defendant claims that the court illegally computed his sentence under § 2D1.1 of the United States Sentencing Guidelines and that his trial counsel was constitutionally ineffective for failing to object to the sentence imposed. "Section 2D1.1 provides that the court use the same base offense level for a crime involving 1.5 kilograms or more of cocaine base that it would use for a crime involving 150 kilograms or more of cocaine." United States v. James, 78 F.3d 851, 854 (3d Cir. 1996). In the 1993 amendments to the sentencing guidelines, the Commission clarified that:

"Cocaine base," for the purposes of this guideline,

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[2] The court, in instructing the jury as to the legal standard for 18 U.S.C. § 924(c)(1), relied on the court of appeals decision in United States v. Hill, 967 F.2d 902 (3d Cir. 1992). In Bailey, the Supreme Court reversed the rationale of Hill, holding that in order to show that a defendant has "used" a firearm under 18 U.S.C. § 924(c)(1), the government must prove that the defendant "actively employed" the firearm in the commission of the underlying offense. See Bailey, 116 S. Ct. at 505. There was no evidence that Harris actively employed the weapon he was charged with "using" in relation to his drug offense in this case and his conviction on that count, therefore, cannot stand.

> means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

U.S.S.G. § 2D1.1. See U.S.S.G. amend. 487 (effective Nov. 1, 1993). "Under this amendment, forms of cocaine base other than crack . . . will be treated as cocaine." Id.

Realizing the harsh consequences which will befall a defendant found to possess the crack form of cocaine base under the guidelines, our court of appeals in James held that the government bears the burden of proving by a preponderance of the evidence that the cocaine base at issue is actually crack cocaine, not some other form of cocaine base. See James, 78 F.3d at 858. In James, the defendant argued that while he had pleaded guilty to possession of "cocaine base," "he never pleaded guilty to possession or distribution of 'crack.'" Id. at 856. The government argued, in turn, that the defendant had waived his right to contend that the cocaine base at issue was crack because he supposedly admitted that the cocaine base was crack at his sentencing hearing. At that hearing, the government informed the court that "Mr. James exchanged a plastic baggy that contained some suspected crack cocaine. That was sent to a lab, analyzed, and was determined to be--I believe the net weight was 22.0 grams of cocaine base or crack cocaine." Id. The court of appeals, however, was unable to find that by answering "yes" to this statement, the defendant made a knowing and voluntary waiver of his right to contest the nature of the cocaine base:

> The problem here . . . on this record with the defendant and court speaking in terms of cocaine base, and the prosecutor referring to the cocaine base as crack, is whether the Government's characterization of the contraband constitutes a sufficient admission of the defendant under these circumstances that he possessed and sold crack merely because he answered 'yes' to the prosecution's description of the crime. . . . We do not believe that, without more, the casual reference to crack by the Government in the colloquy with the court over "the relevant quantity of cocaine base in determining Mr. James's offense level" unmistakably amounted to a knowing and voluntary admission that the cocaine base constituted crack.

Id.

Unlike James, there was never any question in this case that the cocaine base the defendant was charged with possessing with intent to distribute was crack cocaine. Indeed, from the outset it was clear that the defendant was charged with possession of "crack" cocaine base because the indictment specifically charged the defendant with "knowingly and intentionally possess[ing] with intent to distribute more than 50 grams . . . of a mixture or substance containing a detectable amount of cocaine base ("crack") . . . ." Indictment count I. See Pyles v. United States, Civ. No. 96-8562, 1997 WL 241109 at *2-*3 (E.D. Pa. May 5, 1997) (distinguishing James on basis of charge in indictment of possession of "crack"); United States v. Brown, 957 F. Supp. 696, 698 (E.D. Pa. 1997) ("[U]nlike James, where the indictment charged the defendant with possession and distribution of cocaine base, the indictment in this case charged the defendant with possession with intent to distribute cocaine base crack."). Thus, in this case the parties were aware from the outset that

the defendant was charged with possession of crack cocaine.

Further, the record in this case is abundantly clear that the cocaine base defendant was charged with possessing and distributing was crack cocaine. See United States v. Hall, 109 F.3d 1227, 1236 (7th Cir. 1997) (distinguish James because, unlike James, in that case "[w]itness after witness testified that the substance was 'crack.'"); Pyles, 1997 WL 241109 at *3 ("The government produced voluminous evidence at trial proving Pyles' distribution of 'crack,' and the record is replete with references to 'crack' cocaine."). In its preliminary instructions to the jury, the court informed the jury that the defendant was charged with possession of "crack." N.T. July 6, 1994 at 73. The prosecutor informed the jury in his opening arguments that he intended to prove that the defendant was in possession of "crack cocaine." Id. at 90. One of the arresting officers, Agent Eggles, testified that upon searching the defendant's apartment, the agents discovered "suspected crack cocaine." Id. at 104. Eggles further explained the process for producing crack cocaine, and stated that the substance discovered in the defendant's apartment was consistent with cocaine base which had gone through that process, and was in fact crack cocaine. See id. at 124. Eggles also testified that crack cocaine is typically distributed in color coded vials, and that such vials were found on the defendant's possession. See id. at 126. Another arresting officer, Agent McKeefery, testified that he believed the substance in question was crack cocaine. See

N.T. July 7, 1994 at 16. In its charge to the jury, the court informed the jury that count one of the indictment charged the defendant with possession of "crack." See N.T. July 8, 1994 at 17-18. Finally, the presentence investigation report identified the illegal substance in count one of the indictment as "crack cocaine." PSR at ¶ 10; see United States v. Washington, No. 96-3057, 1997 WL 297375 at *4 (D.C. Cir. June 6, 1997) (noting that James did not consider the case where the presentence report used the term "crack").[3]

Defendant's reliance on James (to the extent such reliance is not waived by failure to raise the issue on direct appeal, see United States v. Essig, 10 F.3d 968, 976-79 (3d Cir. 1993) (defendant must show cause and prejudice for failure to raise a challenge to his sentence on direct appeal)) is therefore misplaced. Unlike James, "[t]here is no doubt that in the instant case, the government proved by a preponderance of the evidence that the 'cocaine base' at issue was indeed 'crack' cocaine." Pyles, 1997 WL 241109 at *2. Defendant was not, therefore, sentenced to an illegal sentence under the sentencing guidelines.

To the extent Harris argues that his counsel was constitutionally ineffective for failing to pursue the issue of whether the defendant was in possession of crack, rather than

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[3] The transcript from the first sentencing hearing, which was incorporated into the second sentencing hearing, also makes clear that this case involved crack cocaine. See N.T. July 27, 1993 at 9.

some other form of cocaine base, the argument similarly founders. In order to show ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must make a two part showing. First he must show that his attorney's performance was objectively deficient and second he must prove the deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Given the voluminous evidence that the cocaine seized from the defendant was in fact crack cocaine, rather than some other form of cocaine base, Harris' "counsel acted reasonably in not raising the objection, and [Harris] could not show he was prejudiced by this omission." Pyles, 1997 WL 241109 at *2.

The court will, therefore, deny the defendant's motion pursuant to § 2255 insofar as it rests on the Third Circuit's opinion in United States v. James, 78 F.3d 851 (3d Cir. 1996).

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ORDER

AND NOW, this day of June, 1997, after consideration of the defendant's petition for relief pursuant to 28 U.S.C. § 2255 and the Government's response thereto, IT IS HEREBY ORDERED that:

1. Defendant's motion is GRANTED as to the court's judgment of sentence on count three of the indictment charging the defendant with violation of 18 U.S.C. § 924(c). A hearing to vacate and set the judgment aside and to resentence Harris and correct the sentence as may be appropriate, in accordance with the accompanying memorandum, is scheduled for August 19, 1997 at 4:00 p.m., Courtroom 3-B, United States Courthouse, 601 Market Street, Phila., PA 19106.

2. Defendant's motion is DENIED in all other respects.

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William H. Yohn, Jr., Judge